FOR ARGUMENT

Supreme Court, U.S.
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No. 01-595

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ANGELA RUIZ,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether before pleading guilty, a criminal defendant has a constitutional right to obtain material exculpatory information, including impeachment material, from the government.

2. If so, whether that right may be waived through a plea agreement.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 8

A. The Due Process Clause Requires That *Brady* Material Be Disclosed Prior to a Guilty Plea ... 8

1. The Principles Underlying *Brady* Require Pre-Plea Disclosure of Material Exculpatory Evidence 8

2. *Hill* Supports The Conclusion That A Plea Entered Without Disclosure of Material Exculpatory Evidence Is Involuntary 15

3. A Plea Entered Without Disclosure of *Brady* Material is Invalid As Based Upon Misrepresentation or Impermissible Conduct By the Prosecution 22

4. The Lower Courts Agree That *Brady* Applies Pre-Plea 24

5. The *Brady* Trilogy Supports Recognition of a Due Process Right to Pre-Plea *Brady* Disclosure 25

a. Negotiated Guilty Pleas Are Not "Foolproof." 26

TABLE OF CONTENTS – Continued

Page

b. The Lack of *Brady* Disclosure Compromises the Accuracy of *Alford* and *Nolo Contendere* Pleas 31

c. Some Defendants Cannot Determine Their Guilt or Innocence Absent *Brady* Disclosure 32

6. The Policy Arguments Offered by the Solicitor General and the *Amici* States Are Far Outweighed By the Individual and Societal Interests In Not Convicting the Innocent ... 36

B. The Right To Pre-Plea *Brady* Disclosure Cannot Be Waived Because It Is Necessary to a Knowing and Voluntary Plea and Because Such Disclosure Is Fundamental to the Reliability of the Fact-Finding Process 42

CONCLUSION 47

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Ake v. Oklahoma, 470 U.S. 68 (1985) 7, 36, 42

Banks v. United States, 920 F. Supp. 688 (E.D.Va. 1996) 25

Blackledge v. Allison, 431 U.S. 63 (1977) 26, 27

Bordenkircher v. Hayes, 434 U.S. 357 (1978) 12

Boykin v. Alabama, 395 U.S. 238 (1969) 46

Brady v. Maryland, 373 U.S. 83 (1963) ..... *passim*

Brady v. United States, 397 U.S. 742 (1970) ..... *passim*

Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945) 44

Campbell v. Marshall, 769 F.2d 314 (6th Cir. 1985) 24

Dismuke v. United States, 864 F.2d 106 (11th Cir. 1989) 35

Faretta v. California, 422 U.S. 806 (1975) 46

Fontaine v. United States, 411 U.S. 213 (1973) 26

Giglio v. United States, 405 U.S. 150 (1972) 23

Henderson v. Morgan, 426 U.S. 637 (1976) 34, 35

Herrera v. Collins, 506 U.S. 390 (1993) 19

Hill v. Lockhart, 474 U.S. 52 (1985) ..... *passim*

Jacobson v. United States, 503 U.S. 540 (1992) 20

Kyles v. Whitley, 514 U.S. 419 (1995) ..... *passim*

Lefkowitz v. Newsome, 420 U.S. 283 (1975) 39

Lewis v. United States, 985 F. Supp. 654 (S.D.W.V. 1997) 11

TABLE OF AUTHORITIES – Continued

Page

Matthew v. Johnson, 201 F.3d 353 (5th Cir. 2000) ..15, 19

McCarthy v. United States, 394 U.S. 459 (1968) 16

McMann v. Richardson, 397 U.S. 759 (1970) 16, 30

Menna v. New York, 431 U.S. 61 (1975) 28, 29

Miller v. Angliker, 848 F.2d 1312 (2d Cir. 1988) ... *passim*

North Carolina v. Alford, 400 U.S. 25 (1970) 31, 32

Pennsylvania v. Ritchie, 480 U.S. 39 (1987) 14, 38

Peretz v. United States, 501 U.S. 923 (1991) 44

Sanchez v. United States, 50 F.3d 1448 (9th Cir. 1995) ..... *passim*

Strickland v. Washington, 466 U.S. 668 (1984) ..... *passim*

Strickler v. Greene, 527 U.S. 263 (1999) 8, 14, 39, 41

Tollett v. Henderson, 411 U.S. 258 (1973) 7, 29, 30

United States v. Agurs, 427 U.S. 97 (1976) ... 5, 8, 17, 21, 28

United States v. Bagley, 473 U.S. 667 (1985) ..... *passim*

United States v. Broce, 488 U.S. 563 (1989) 30, 31

In re United States v. Coppa, 267 F.3d 132 (2d Cir. 2001) 17, 38

United States v. Cronic, 466 U.S. 648 (1984) 21

United States v. Crooker, 729 F.2d 889 (1st Cir. 1984) 21, 33

United States v. Fine, 975 F.2d 596 (9th Cir. 1992) 10

United States v. International Paper Company, 457 F. Supp. 571 (S.D. Tex. 1978) 10

TABLE OF AUTHORITIES – Continued

Page

United States v. James, 169 F.3d 1210 (9th Cir. 1999) 34

United States v. Jennings, 960 F.3d 1488 (9th Cir. 1992) 39

United States v. Knights, 122 S. Ct. 587 (2001) 15

United States v. Lopez, 581 F.2d 1338 (9th Cir. 1978) 45

United States v. Mezzanatto, 513 U.S. 196 (1995) .. *passim*

United States v. Olano, 507 U.S. 725 (1993) 44

United States v. Ross, 245 F.3d 577 (6th Cir. 2001) 24

United States v. Ruiz, 241 F.3d 1157 (9th Cir. 2001) ..*passim*

United States v. Smith, 160 F.3d 117 (2d Cir. 1998) 35

United States v. Timbana, 222 F.3d 688 (9th Cir. 2000) 10

United States v. Valenzuela-Bernal, 458 U.S. 858 (1982) 17

United States v. Walters, 269 F.3d 1207 (10th Cir. 2001) 24

United States v. Wright, 43 F.3d 491 (10th Cir. 1994) 23

Von Moltke v. Gillies, 332 U.S. 708 (1948) 9

Waley v. Johnston, 316 U.S. 101 (1942) 43

White v. United States, 858 F.2d 416 (8th Cir. 1988) 24

In re Winship, 397 U.S. 358 (1970) 12, 13, 33

STATE CASES

In re Alvernaz, 8 Cal. Rptr. 2d 713 (Cal. 1992) 31

Carroll v. State, 474 S.E.2d 737 (Ga. App. 1996) 11

TABLE OF AUTHORITIES – Continued

Page

Gibson v. State, 514 S.E.2d 320 (S.C. 1999) 11, 25

In the Matter of Grant, 541 S.E.2d 540 (S.C. 2001) 24

Lee v. State, 573 S.W.2d 131 (Mo. App. 1978) 11

Ex Parte Lewis, 587 S.W.2d 697 (Tex. App. 1979) ..11, 25

People v. Curry, 627 N.Y.S.2d 214 (N.Y. Sup. Ct. 1995) 11

Scroggins v. State, 859 S.W.2d 704 (Mo. App. 1993) 25

State v. Davis, 823 S.W.2d 217 (Tenn. Ct. Crim. App. 1991) 25

State v. Gardner, 885 P.2d 1144 (Idaho App. 1994) ...11, 25

State v. Johnson, 544 So. 2d 767 (La. App. 1989) 11

State v. Parsons, 775 A.2d 576 (N.J. Super. 2001) 25

State v. Sturgeon, 605 N.W.2d 589 (Wis. 1999) 25

Villareal v. State, 860 S.W.2d 529 (Ct. App. Tex. 1993) 25

Zacek v. Brewer, 241 N.W.2d 41 (Iowa 1976) 21

CONSTITUTION

U.S. CONST. amend. V 1

FEDERAL RULES

Fed. R. Crim. P. 11(b) 31

Fed. R. Crim. P. 11(e)(1)(B) 2

Fed. R. Crim. P. 11(f) 35

Fed. R. Crim. P. 16(d)(1) 38

TABLE OF AUTHORITIES – Continued

Page

Fed. R. Crim. P. 31 45

Fed. R. Crim. P. 32(e) 32

FEDERAL STATUTES

18 U.S.C. § 2113(a) 32

21 U.S.C. § 841 3

21 U.S.C. § 952 ..... 2, 3

21 U.S.C. § 960 ..... 2, 3

28 U.S.C. § 1254(1) 1

MISCELLANEOUS

Holly Becka & Tim Wyatt, *Fake Drugs Cast Doubt on 24 Cases: Police Study Procedures After Evidence Is Found To Be Crushed Wallboard*, Dallas Morning News, January 15, 2002, available at 2002 WL 2007783 33

Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide To Loss, Abandonment and Alienation*, 68 Fordham L. Rev. 2011 (2000) 40, 44, 47

George Bowyer, *Commentaries on the Constitutional Law of England* (1846) 9

Frank H. Easterbrook, *Plea Bargaining As Compromise*, 101 Yale L.J. 1969 (1992) 9

Corinna Lain, *Accuracy Where It Matters: Brady v. Maryland in the Plea Bargaining Context*, 80 Wash. U. L.Q. 1 (forthcoming April 2002) 9

TABLE OF AUTHORITIES – Continued

Page

Kevin C. McMunigal, *Disclosure and Accuracy In the Guilty Plea Process*, 40 Hastings L.J. 957 (1989) ..... *passim*

Note, *The Alford Plea: A Necessary But Unpredictable Tool for the Criminal Defendant*, 72 Iowa L. Rev. 1063 (1987) 32

Response Brief for Appellee United States, Filed in the Ninth Circuit Court of Appeals 3

Barry Scheck et al., *Actual Innocence* (2000) 9

Robert E. Scott & William J. Stuntz, *Plea Bargaining As Contract*, 101 Yale L.J. 1909 (1992) 9

UNITED STATES SENTENCING GUIDELINES

USSG § 3B1.2 2

USSG § 3E1.1 2

OPINION BELOW

The Ninth Circuit Court of Appeals' opinion is reported at *United States v. Ruiz*, 241 F.3d 1157 (9th Cir. 2001).

JURISDICTION

The Ninth Circuit entered its judgment on March 5, 2001. The petition for rehearing was denied on June 11, 2001. Pet. App. 40a. The Court has jurisdiction. 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment to the Constitution:

> No person shall . . . be deprived of life, liberty, or property without due process of law . . . .

STATEMENT OF THE CASE

On August 13, 1999, Respondent was arrested as she attempted to enter the United States driving a vehicle containing 31 kilograms of marijuana. J.A. 25-26.

The government offered Respondent a plea agreement pursuant to the "fast-track" program. J.A. 9-20. That program requires an early guilty plea and that the defendant not file or argue motions. *See Ruiz*, 241 F.3d at 1161. The government's offer required Respondent to (1) waive her right to indictment and plead guilty to an information

charging a violation of 21 U.S.C. §§ 952 and 960; (2) waive substantially all her appellate rights; and (3) waive her right to receive certain *Brady/Giglio*[1] information. J.A. 9, 12, 17-18. The *Brady* waiver provides:

> The government represents that any information establishing the factual innocence of the defendant known to the undersigned prosecutor in this case has been turned over to the defendant. The government understands it has a continuing duty to provide such information establishing the factual innocence of the defendant.
>
> The defendant understands that if this case proceeded to trial, the government would be required to provide impeachment information relating to any informants or other witnesses. In addition, if the defendant raised an affirmative defense, the government would be required to provide information in its possession that supports such a defense. In return for the government's promises set forth in this agreement, the defendant waives the right to this information, and agrees not to attempt to withdraw the guilty plea or to file a collateral attack based on the existence of this information. J.A. 12.

In exchange, the government offered to make various sentencing recommendations to the District Court, including downward adjustments for role, USSG § 3B1.2, and acceptance of responsibility, *id.* § 3E1.1, and a downward departure based on the "fast-track" program. J.A. 15. The government's recommendations were not binding on the District Court under Fed. R. Crim. P. 11(e)(1)(B).

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[1] *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972).

J.A. 14. Respondent could request additional adjustments and departures. J.A. 16.

Respondent declined the offer because she objected to waiving her *Brady/Giglio* rights. Pet. App. 41a. As a result, she was indicted on September 8, 1999, and charged with importation of marijuana, 21 U.S.C. §§ 952 and 960, and possession of marijuana with intent to distribute, 21 U.S.C. § 841. J.A. 7-8.

On October 12, 1999, Respondent entered a guilty plea to the importation charge without a plea agreement. J.A. 22-27. At sentencing, Respondent requested a "fast-track" departure, relying on the facts that she filed no motions, entered a prompt plea, and declined the offer only because of the unconstitutional waiver provision. Pet. App. 41a-43a. The government opposed any "fast track departure" claiming it was "giving up all the benefits that would normally come with the fast track departure." *Id.* at 42a. The District Court denied the request, stating that a "plea bargain [is] a matter of contract that's an offer and acceptance." *Id.* The District Court made no other findings, and sentenced Respondent to a term of 18 months in custody. *Id.* at 43a.

Respondent appealed, arguing that the District Court had discretion to depart, which it did not acknowledge, because the government unconstitutionally insisted on a "*Brady/Giglio*" waiver. The government argued that while it recognized its continuing responsibility to produce exculpatory evidence of the defendant's actual innocence, it could constitutionally seek a waiver of the right to receive material information that went to impeachment or any affirmative defense. *Response Brief for Appellee*

United States, Filed in the Ninth Circuit Court of Appeals, at 24.

The Ninth Circuit reversed and remanded for resentencing. Following *Sanchez v. United States*, 50 F.3d 1448 (9th Cir. 1995), it reaffirmed that a defendant has a due process right to receive material exculpatory evidence in the possession of the government prior to entering a guilty plea. *Ruiz*, 241 F.3d at 1164. The Ninth Circuit concluded that "[t]he disclosure of *Brady* evidence is just as important in ensuring the voluntary and intelligent nature of a plea bargain as it is in ensuring the voluntary and intelligent nature of a plea." *Id. Ruiz* further held that the right to this necessary predicate to a voluntary and intelligent plea of guilty could not be waived. *Id.* at 1164-65.

The dissent argued various policy considerations militated against the constitutional requirement reaffirmed in *Ruiz*. *Id.* at 1176-77 (Tallman, J., dissenting).

SUMMARY OF ARGUMENT

The Due Process Clause requires that the prosecution provide a defendant with "evidence . . . material either to guilt or punishment" prior to the entry of a guilty plea, just as it requires that same evidence be provided to a defendant who exercises his right to trial. *Brady*, 373 U.S. at 87.[2] The Court's *Brady* jurisprudence is informed by the

[2] Because material exculpatory evidence and material impeachment evidence are constitutionally indistinguishable,

" 'overriding concern with the justice of the finding of guilt.' " *Bagley*, 473 U.S. at 678 (quoting *United States v. Agurs*, 427 U.S. 97, 112 (1976)). That concern should be no less significant in cases where "the finding of guilt" is made pursuant to a guilty plea. Application of *Brady* to guilty pleas will have the effects of (1) ensuring the reliability of guilty pleas by discouraging the innocent from pleading guilty and (2) preserving the reputation of judicial proceedings by preventing prosecutorial authorities from inducing guilty pleas by withholding exculpatory evidence.

The Solicitor General's current position that it need not disclose any *Brady* material at all prior to a guilty plea ignores the Court's observation that it cannot "say that guilty plea convictions hold no hazards for the innocent." *Brady v. United States*, 397 U.S. 742, 757 (1970). The rule that the Solicitor General proposes unjustifiably increases the risk that innocent but risk-averse defendants will accept favorable plea bargains and needlessly demeans the values underlying *Brady*.

In holding that a defendant is entitled to receive material exculpatory evidence prior to entering a guilty plea, the Ninth Circuit joined the Second, Sixth and Tenth Circuits. It holds that just as a guilty plea may be invalidated as involuntary and unknowing due to defense counsel's failure to discover material exculpatory evidence and advise his client accordingly, *see Hill v. Lockhart*, 474 U.S. 52 (1985), the failure of the government to

United States v. Bagley, 473 U.S. 667, 676 (1985), both types of evidence will be referred to collectively as *Brady* information.

disclose such material evidence similarly renders a plea of guilty involuntary and unknowing by compromising defense counsel's ability to provide effective assistance of counsel. *See Sanchez*, 50 F.3d at 1453-54. Because the Sixth Amendment right to counsel, like the Due Process Clause, serves to ensure the accuracy, or reliability, of criminal convictions, *see Strickland v. Washington*, 466 U.S. 668, 691-92 (1984), any other result would be anomalous: defense counsel's failure to discover a particular material fact would invalidate the plea under the Sixth Amendment as unworthy of reliance while the Due Process Clause would tolerate an equally unreliable conviction occasioned by the government's concealment of the same fact.

The Second Circuit's approach is equally compelling: a guilty plea entered in the absence of *Brady* disclosure is invalid as induced by " 'misrepresentation or other impermissible conduct by state agents.' " *Miller v. Angliker*, 848 F.2d 1312, 1320 (2d Cir. 1988) (quoting *Brady v. United States*, 397 U.S. at 757). *Miller*'s misrepresentation approach follows closely the analysis undertaken in Justice Blackmun's separate opinion in *Bagley*. *See* 473 U.S. at 682 (Blackmun, J., sep. op.) ("an incomplete response to a specific [*Brady*] request . . . has the effect of representing to the defense that the [*Brady*] evidence does not exist"); *accord id.* at 714-15 (Stevens, J., dissenting). The Second Circuit also applies the materiality standard set forth in *Hill*. *Miller*, 848 F.2d at 1322; *accord Sanchez*, 50 F.3d at 1454.

The Solicitor General's interpretation of the *Brady* trilogy is mistaken. As noted above, both the Ninth and Second Circuit approaches address the application of the

Brady trilogy, concluding that the trilogy is inapplicable under *Hill*. More generally, the Court has never held that a guilty plea cures constitutional errors that go to the reliability of the determination of guilt itself, as opposed to constitutional and other issues which are "independent" of the issue of guilt. *See, e.g., Tollett v. Henderson*, 411 U.S. 258, 267 (1973) (post-plea, a defendant "may not thereafter raise *independent* claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea") (emphasis added). The claim that an innocent defendant was induced to enter a guilty plea by a favorable plea bargain that he would not have accepted had there been *Brady* disclosure is in no sense "independent" of the validity of the determination of guilt.

The Solicitor General's reliance on *Ake v. Oklahoma*, 470 U.S. 68 (1985), is misplaced. While a constitutional rule requiring the disclosure of *Brady* material prior to a guilty plea does exact a cost from the prosecution, that cost is more than counter-balanced by the vindication of the "compelling interest of both the States and the individual in accurate dispositions [of criminal accusations]." *Id.* at 79.

Finally, the Ninth Circuit correctly concluded that the right to receive *Brady* material cannot be waived. Because a guilty plea must be knowing and voluntary, and a guilty plea entered without *Brady* disclosure is not knowing and voluntary, *Brady* disclosure cannot be waived. Moreover, some procedural principles are "so fundamental to the reliability of the fact-finding process that they may never be waived without irreparably discrediting the federal courts." *United States v. Mezzanatto*, 513 U.S. 196, 204 (1995) (citations omitted). As a bedrock due process

right that is directed "to the reliability of the fact-finding process," *id.*, the right to *Brady* material cannot be waived.

ARGUMENT

A. The Due Process Clause Requires That *Brady* Material Be Disclosed Prior to a Guilty Plea.

1. The Principles Underlying *Brady* Require Pre-Plea Disclosure of Material Exculpatory Evidence.

Brady "hold[s] that the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is *material* either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87 (emphasis added). Only *material* favorable evidence is subject to disclosure. *Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995). Evidence is material under *Brady* " 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would be different.' " *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (quoting *Bagley*, 473 U.S. at 682).

While the Court's *Brady* cases have arisen in the context of defendants challenging the results of their trials or sentencing hearings, the principles articulated in the Court's cases are equally applicable to convictions entered as a result of guilty pleas. *Brady* is animated by the "overriding concern with the justice of the finding of guilt." *Agurs*, 427 U.S. at 112. Because negotiated pleas of guilty are "no more foolproof than full trials to the court

or to the jury," *Brady v. United States*, 397 U.S. at 757, that "overriding concern" is equally applicable in the context of a guilty plea. *See id.* (the Court cannot "say that guilty plea convictions hold no hazards for the innocent"). *Brady* disclosure can only serve to enhance the accuracy of such negotiated pleas by eliminating a major "hazard[ ] for the innocent": the ignorance of material exculpatory evidence possessed by the prosecution. *See generally* Corinna Lain, *Accuracy Where It Matters: Brady v. Maryland in the Plea Bargaining Context*, 80 Wash. U. L.Q. 1 (forthcoming April 2002).

The courts have long recognized that " 'there may be circumstances which may induce an innocent man to accuse himself.' " *Von Moltke v. Gillies*, 332 U.S. 708, 719 n.5 (1948) (plurality opinion) (quoting George Bowyer, *Commentaries on the Constitutional Law of England* 355 n.7 (1846)). An innocent defendant offered a reduced sentence pursuant to a plea bargain faces such "circumstances." While an innocent person may always seek vindication though trial, trial is no guarantee: it is widely known that mistakes are made, and serious ones at that. *See, e.g.*, Barry Scheck et al., *Actual Innocence* (2000); *see also* Robert E. Scott & William J. Stuntz, *Plea Bargaining As Contract*, 101 Yale L.J. 1909, 1943 (1992) ("Unfortunately, trials make mistakes. Some innocent defendants – no one knows how many – are convicted."); Frank H. Easterbrook, *Plea Bargaining As Compromise*, 101 Yale L.J. 1969, 1970 (1992) ("Some innocent persons are . . . prosecuted"). As a result, no innocent defendant considering the options of trial, with its potential for acquittal and its downside of a more severe penalty, or plea bargaining, with its assurances of a less severe penalty and

downside of certain conviction, believes that selecting the former option is risk free. *See United States v. Fine*, 975 F.2d 596, 604 (9th Cir. 1992) (en banc) ("[o]verly lenient plea bargains may induce innocent defendants to plead guilty"); *United States v. International Paper Company*, 457 F. Supp. 571, 576 (S.D. Tex. 1978) ("plea bargaining . . . creates the possibility that an innocent person may plead guilty out of fear of conviction and a harsher sentence"); *see also United States v. Timbana*, 222 F.3d 688, 718 (9th Cir. 2000) ("Innocent people may plead guilty, for various reasons. An innocent person may want to take advantage of a discounted sentence in a plea bargain rather than gamble on a far greater sentence if a mistaken verdict is returned.") (Kleinfeld, J., dissenting).

Cases in which prosecutors possess material exculpatory evidence are those in which they will perceive the greatest chance of acquittal and which they therefore have the greatest incentive to resolve though attractive plea bargains. *See generally* Kevin C. McMunigal, *Disclosure and Accuracy*, 40 Hastings L.J. 957, 990-92 (1989) (in cases where there is undisclosed material exculpatory evidence, "three factors will tend to converge: questionable guilt, strong inducements to plead guilty in the form of high sentencing differentials, and a defendant who overestimates the government's chances for conviction"). As a result, the pressures created by plea bargaining and the uncertainty associated with trial create a real risk of false self-condemnation,[3] a risk that can be substantially

[3] *See, e.g., Miller*, 848 F.2d 1312 (defendant's concession to factual guilt of several murders set aside where prosecutor suppressed information indicating that another person committed the offenses); *Lewis v. United States*, 985 F. Supp. 654 (S.D.W.V. 1997) (Defendant's conviction for mail fraud set aside where prosecutor suppressed information showing defendant never used U.S. Postal Service to deliver document); *Carroll v. State*, 474 S.E.2d 737 (Ga. App. 1996) (defendant was entitled to withdraw guilty plea to vehicular homicide where prosecutor suppressed information that road conditions contributed to accident and defendant's speed could not be determined); *State v. Gardner*, 885 P.2d 1144 (Idaho App. 1994) (defendant entitled to withdraw vehicular manslaughter plea where prosecutor suppressed eyewitness testimony that victim's death was caused by tire blowout and not defendant's fatigue or drug use); *State v. Johnson*, 544 So.2d 767 (La. App. 1989) (defendant's guilty plea to distribution of marijuana was invalid where prosecutor suppressed strong alibi evidence); *Lee v. State*, 573 S.W.2d 131 (Mo. App. 1978) (defendant entitled to withdraw guilty plea where prosecutor suppressed information that victim made false identification in photo lineup and was shown a picture of defendant before identifying defendant in person); *People v. Curry*, 627 N.Y.S.2d 214 (N.Y. Sup. Ct. 1995) (defendant entitled to withdraw guilty plea to possession of controlled substance where prosecutor suppressed videotaped evidence of police officer shaking down drug dealers, stealing their money, and selling stolen drugs); *Gibson v. State*, 514 S.E.2d 320 (S.C. 1999) (defendant's manslaughter plea set aside where prosecutor suppressed information that the key eyewitness changed her story when confronted by the prosecutor with her inability to have seen the shooting from her claimed vantage point); *Ex Parte Lewis*, 587 S.W.2d 697 (Tex. App. 1979) (defendant's guilty plea invalid where prosecutor suppressed information that defendant was insane at the time of the offense and incompetent to stand trial).

ameliorated by disclosure of material exculpatory evidence.[4]

[4] While the Court has stated that "[d]efendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven

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The Solicitor General and *Amici* States ignore the cases demonstrating that some innocent defendants do plead guilty and complain that pre-plea *Brady* disclosure will also benefit guilty defendants. They ignore the fact that the requirement of *Brady* disclosure is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

The Solicitor General and the *Amici* States concede, as they must, that *Brady* requires a deviation from the adversarial model[5] to ensure that criminal defendants have access to material exculpatory evidence during their trials to prevent the conviction of those hardy innocents who exercise their right to trial. But the Solicitor General and the *Amici* States undervalue the societal interest in avoiding conviction of the innocent by advocating a reading of

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to false self-condemnation," *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (citation omitted), counsel cannot advise a client that he will not be wrongly convicted, nor can she account in her advice for evidence that has been suppressed by the prosecution. Counsel can advise her client of the likelihood of conviction and requiring the government to disclose material exculpatory evidence will make that advice more accurate and thus more likely to discourage "false self-condemnation." Such advice is the only real means counsel has to encourage an innocent to brave the risks of trial; short of that there is little counsel can (or perhaps should) do to stop a defendant who wishes to accept a plea bargain. *See generally*, McMunigal, *Disclosure and Accuracy*, 40 Hastings L.J. at 988-89.

[5] "By requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model." *Bagley*, 473 U.S. at 675 n.6.

Brady under which prosecutors need not provide similar protections to those less courageous innocents who contemplate accepting a plea bargain, preferring the certainty of a significant sentencing reduction to the uncertain result of trial. There is no basis for favoring one group of innocents over another: a less courageous innocent is an innocent nonetheless.

Brady is also premised on the prosecutor's role as a unique litigant. *See Brady*, 373 U.S. at 87-88. Due process requires the reasonable doubt standard at trial because "[i]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." *Winship*, 397 U.S. at 364. The "moral force of the criminal law" is diluted when prosecutors have an incentive "to deliberately withhold exculpatory information as part of an attempt to elicit guilty pleas." *Sanchez*, 50 F.3d at 1453.[6] Requiring "disclosure [of *Brady* material] will serve to justify trust in the prosecutor as 'the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.' " *Kyles*, 514 U.S. at 439 (internal quotation omitted). In short, "the administration of justice suffers when any accused is treated unfairly." *Brady*, 373 U.S. at 87.

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[6] *Accord* McMunigal, *Disclosure and Accuracy*, 40 Hastings L.J. at 997 ("A criminal justice system that condemns concealment of *Brady* material as a due process violation at trial, but not in plea bargaining, essentially encourages prosecutors to divert [cases in which the prosecution possesses undisclosed *Brady* material] into plea bargaining").

Moreover, the *Brady* right is not limited to trial. It applies to "evidence [that] is material either to guilt or to punishment." *Brady*, 373 U.S. at 87.[7] In *Strickler*, Justice Souter made clear the breadth of *Brady*'s application: "the [*Brady*] prejudice enquiry does not stop at the conviction but goes to each phase of the sentencing process: the jury's consideration of aggravating, death-qualifying facts, the jury's discretionary recommendation of a death sentence if it finds the requisite aggravating factors, and the judge's discretionary decision to follow the jury's recommendation." *Strickler*, 527 U.S. at 297 (Souter, J., concurring in part and dissenting in part) (citing *id.* at 292-96 (maj. op.)).[8]

The Court articulates the *Brady* prejudice standard in terms of the effect on the "proceeding," rather than simply using the term "trial." *See, e.g., Strickler*, 527 U.S. at 280; *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987); *Bagley*,

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[7] Because a defendant who possesses exculpatory evidence will likely receive a more favorable plea offer – i.e., one calling for less punishment – *Brady*'s application to punishment provides an independent basis for disclosure: information that causes the parties to strike an agreement providing for a lesser sentence is "material" as to punishment.

[8] Because it is beyond dispute that *Brady* applies to punishment and that every conviction, whether by guilty plea or by trial, results in punishment of some form, *Brady*'s punishment component is implicated in every case, no matter how the conviction is secured. Given *Brady*'s universal application, the Solicitor General's argument that *Brady* does not apply to cases where the defendant pleads guilty must be understood as urging the Court to find that *Brady* does not apply (at the guilty plea) and does apply (at the sentencing). The Court should not endorse a paradigm in which *Brady* disappears and reappears in a single case.

473 U.S. at 682. While the Court has yet to address *Brady*'s application to guilty pleas, it has made it clear that *Brady*'s application is not limited to trial on liability issues alone.

The Solicitor General argues that "the Court has consistently *limited Brady* to the non-disclosure of exculpatory information that results in the denial of a fair trial by undermining confidence in the reliability of the jury's finding of guilt (or of the resulting sentence)." B.U.S. at 11 (emphasis added); *accord Matthew v. Johnson*, 201 F.3d 353, 361-62 (5th Cir. 2000). The Solicitor General employs the sort of "dubious logic" rejected in *United States v. Knights*, 122 S. Ct. 587 (2001): he argues that the Court's opinions holding that disclosure is required in the context of trial "implicitly hold[ ]" that disclosure is not required when there is no trial. *See id.* at 590-91 (argument "that an opinion upholding the constitutionality of a particular search implicitly holds unconstitutional any search not like it" employs "dubious logic"). The Court has done nothing to "limit" *Brady*'s application; it has simply decided the cases before it in the context in which they came to the Court.

2. *Hill* Supports The Conclusion That A Plea Entered Without Disclosure of Material Exculpatory Evidence Is Involuntary.

Even though it involves the Sixth Amendment right to counsel rather than the Due Process Clause, the Court's decision in *Hill*, 474 U.S. 52, strongly supports the Ninth Circuit's view that a guilty plea entered without *Brady* disclosure is "involuntary." The Court's cases

emphasize the role of the advice of counsel in establishing that guilty pleas are voluntarily and intelligently made. *See Brady v. United States*, 397 U.S. at 758. The Court made clear in *Hill*, however, that "[w]here, as here, a defendant is represented by counsel during the guilty plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.' " 474 U.S. at 56 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). Thus, a plea of guilty based upon sub-standard advice is involuntary and therefore invalid. *Id.*; *accord McCarthy v. United States*, 394 U.S. 459, 466 (1968).

In explicating the "prejudice" inquiry at the plea stage, *Hill* employed defense counsel's failure to uncover exculpatory evidence as an illustration.

> [W]here the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error prejudiced the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial.

Id. at 59. Thus, the failure of counsel to discover a particular exculpatory fact which would likely cause counsel to advise rejection of a plea agreement violates the Sixth Amendment and invalidates the plea.

The Ninth Circuit's pre-plea *Brady* analysis is based upon an analogy to *Hill*: "[e]vidence is 'material' if 'there is a reasonable probability that but for the failure to disclose the *Brady* material, the defendant would have refused to plead and would have gone to trial.' " *Ruiz*, 241 F.3d at 1166 (quoting *Sanchez*, 50 F.3d at 1454).[9] *Sanchez* relied on the Second Circuit's decision in *Miller* in adopting this test. *Sanchez*, 50 F.3d at 1454 (citing *Miller*, 848 F.2d at 1322).

Miller's adoption of *Hill*'s test was informed by the Court's derivation of the post-trial *Brady* test. 848 F.2d at 1321. In *Bagley*, the Court adopted the Sixth Amendment materiality test established in *Strickland*, 466 U.S. at 694, as applicable to post-trial *Brady* claims. *See Bagley*, 473 U.S. at 681-82 (Blackmun, J., sep. op.); *id.* at 685 (White, J., concurring). *Kyles* reaffirmed the Sixth Amendment basis of the *Brady* materiality test. *See* 514 U.S. at 433-34.[10]

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[9] The Solicitor General insists that *Ruiz*'s analysis logically compels the conclusion that the government must turn over not only material exculpatory evidence, but also inculpatory evidence in order for the defendant to maximize his knowledge of the government's case prior to pleading guilty. B.U.S. at 20-22. Quite to the contrary, the Ninth Circuit's materiality test can *never* require the disclosure of inculpatory evidence: no defendant could ever claim that "but for the failure to disclose [even more inculpatory evidence], [he] would have refused to plead and would have gone to trial." *Ruiz*, 241 F.3d at 1166. The lower courts' analysis requires no more than the disclosure of material exculpatory evidence. *See, e.g., In re United States v. Coppa*, 267 F.3d 132, 142 (2d Cir. 2001).

[10] *Strickland* itself derived its test from *Agurs*, 427 U.S. at 104, 112-13, and *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872-74 (1982), both of which are Fifth Amendment cases. *See Strickland*, 466 U.S. at 694. *Strickland*'s derivation of its test only

Miller relied on the parallel development of the Fifth and Sixth Amendment materiality standards and found it

> useful . . . to look to the Supreme Court's discussion of materiality in *Hill v. Lockhart*, . . . which involved a claim that the defendant's decision to enter a plea of guilty was caused by the ineffective assistance of his counsel.

Miller, 848 F.2d at 1322. Thus, *Miller* held that the *Brady* test should focus on whether the undisclosed evidence created a "reasonable probability" that the defendant "would have insisted on going to a full trial." *Id.*

Miller correctly adopted *Hill*'s Sixth Amendment analysis because both that right and the Due Process Clause serve to provide assurance that criminal convictions are accurate. As the Court explained in *Strickland*, the right to counsel represents "one of the crucial assurances that the result of the proceeding is reliable," *Strickland*, 466 U.S. at 694, and is "critical to the ability of the system to produce a just result." *Id.* at 685. "The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." *Id.* at 691-92. Reliability requires accuracy.

Hill's recognition that *Strickland* applies to the guilty plea process demonstrates that the Sixth Amendment serves to promote accuracy of the convictions entered

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serves to emphasize the inter-relatedness of the Fifth and Sixth Amendment questions posed by the failure of the government to disclose, and of defense counsel to discover, material exculpatory information.

pursuant to such pleas. In other words, a plea entered without the discovery of material exculpatory evidence is one upon which reliance is not justified.[11]

While the right to counsel is "one of the crucial assurances" of accuracy, it is not the only one: *Brady* also provides such assurances. "[A] *Brady* violation [requires a] showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435. Thus, like the right to counsel, the Due Process right to *Brady* material serves to produce "a trial worthy of confidence." *Id.* at 434. Given that the trial rights to effective assistance of counsel and access to material exculpatory evidence perform complementary roles in promoting reliable, i.e., accurate, verdicts, it follows that the two rights would also perform complementary roles in promoting reliable, i.e., accurate, guilty pleas. *See Herrera v. Collins*, 506 U.S. 390, 398-99 (1993) (*Brady* and

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[11] The Fifth Circuit's claim that *Brady* does not apply to a guilty plea "proceeding" is based on its observation that when *Bagley* used the term "proceeding" rather than "trial," it derived that term from *Strickland*. *See Matthew*, 201 F.3d at 362 n.13. In employing the term "proceeding" in *Strickland*, the Fifth Circuit argues, this "Court's formulation contemplated a proceeding at which a factfinder was responsible for determining a defendant's *guilt or innocence* . . . ." *Id.* (emphasis added). Separate and apart from the fact that *Strickland* involved a penalty proceeding, not a determination of guilt or innocence, *Matthew*'s suggestion that the Court's Sixth Amendment jurisprudence supports its effort to cabin *Brady*'s Due Process Clause analysis is plainly mistaken: *Hill* demonstrates that a guilty plea is a "proceeding" to which *Strickland* applies.

Strickland guarantee rights that "have the effect of ensuring against the risk of convicting an innocent person").

Rejection of the analysis contained in *Hill* and adoption of the government's approach would lead to anomalous results. For example, in *Jacobson v. United States*, 503 U.S. 540 (1992), the Court found that Jacobson had been entrapped as a matter of law into receiving visual depictions of minors engaging in explicit sexual acts due to the conduct of various government agencies in soliciting orders from him. If Jacobson had entered a guilty plea without knowing that those who solicited him were government actors, thereby foregoing his entrapment defense, the question of whether his plea was voluntary or not would depend – under the government's approach – solely on whether or not his counsel should have discovered the fact that the solicitors were government agents. If counsel should have discovered that fact, Jacobson's plea would be involuntary because he pleaded guilty without knowing a fact reasonably likely to cause him to go to trial: the availability of an entrapment defense. *See Hill*, 474 U.S. at 59. By the same token, if the government had successfully concealed the identity of the solicitors, such that counsel could not have discovered it, Jacobson's plea would suddenly be voluntary.

It would be bizarre indeed if the voluntariness of Jacobson's plea were to depend upon the government's skill at concealing material exculpatory facts. *Hill*, 474 U.S. at 56, makes clear that a plea is not voluntary if the defendant is kept in the dark as to material exculpatory facts; it should not matter who is at fault for the defendant's ignorance. In other words, the identity of the

responsible party is not logically related to the voluntariness of the defendant's plea. If defense counsel is at fault, then the Sixth Amendment provides relief under *Hill* due to the failure of the system to produce a "just result[ ]." *Strickland*, 466 U.S. at 685. But if it is the government that has failed to disclose the information, precluding a "just result," *id.*, then *Brady*'s Fifth Amendment analysis should apply. *See Ruiz*, 241 F.3d at 1165.[12]

Indeed, that is the conclusion that Justice Breyer reached writing for the First Circuit in *United States v. Crooker*, 729 F.2d 889 (1st Cir. 1984). *Crooker* held that the prosecution was required to disclose facts that would have established an entrapment defense prior to a guilty plea, *id.* at 890 (citing *Agurs*, 427 U.S. at 107), and that the failure to disclose such facts, if proved, "would make out the 'manifest injustice' needed to set aside a guilty plea." *Id.*

The Solicitor General argues that *Hill* is irrelevant because a criminal defendant has no "right to effective assistance from the prosecution," B.U.S. at 23, and

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[12] The government's conduct in withholding material exculpatory evidence that cannot be discovered by defense counsel would have the effect of preventing counsel from offering adequate advice at a critical stage of the prosecution. "The Court has uniformly found constitutional error . . . when counsel was . . . prevented from assisting the accused during a critical stage of the proceeding." *United States v. Cronic*, 466 U.S. 648, 659 n.25 (1984) (collecting cases); *see also Zacek v. Brewer*, 241 N.W.2d 41, 53-54 (Iowa 1976) (finding guilty plea involuntary and unintelligent because of non-disclosure of "fundamentally unfair police activity [that] deprived [defendant's] counsel of the opportunity effectively to assist [him]").

observes that the Court has "never held that the United States Constitution requires the State to furnish a defendant with information about parole eligibility in order for a defendant's plea of guilty to be voluntary." *Hill*, 474 U.S. at 56. The constitutional rule adopted by the Ninth Circuit and the other lower courts serves only to guarantee access to material favorable evidence; it does not even suggest that the government should be required to shoulder a burden analogous to that rejected in *Hill*. Defendants need material exculpatory evidence, not legal advice, from the prosecutor. *See Bagley*, 473 U.S. at 698 (Marshall, J., dissenting) ("it is the job of the defense, not the prosecution, to decide whether and in what way to use arguably favorable evidence").

3. A Plea Entered Without Disclosure of *Brady* Material is Invalid As Based Upon Misrepresentation or Impermissible Conduct By the Prosecution.

The failure to disclose *Brady* information prior to a guilty plea also invalidates a guilty plea because it is based on "misrepresentation or other impermissible conduct by state agents." *Miller*, 848 F.2d at 1320 (citing *Brady v. United States*, 397 U.S. at 757). Because the non-disclosure of *Brady* material is "impermissible conduct by state agents," then "even a guilty plea that was 'knowing' and 'intelligent' may be vulnerable to challenge if it was entered without knowledge of material evidence withheld by the prosecution." *Id.*[13]

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[13] The Tenth Circuit views "[s]uch claims [as] directly challeng[ing] the voluntary and intelligent nature of the plea."

Miller's approach is supported by opinions of this Court emphasizing that the non-disclosure of *Brady* material is a form of misrepresentation. "The prosecution's affirmative duty to disclose evidence favorable to a defendant can trace its origins to early 20th-century strictures against misrepresentation . . . ." *Kyles*, 514 U.S. at 432. Justice Blackmun's separate opinion in *Bagley* likewise emphasizes the potential for misleading the defense associated with the non-disclosure of *Brady* material.

> The Government notes that an incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist. . . . In reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it would otherwise have pursued. . . .
>
> We agree that the prosecutor's failure to respond to a *Brady* request may impair the adversary process in this manner. And the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption.

Bagley, 473 U.S. at 682 (Blackmun, J., sep. op.); *accord id.* at 714-15 (Stevens, J., dissenting) ("silence [after a specific *Brady* request] actively misleads in the same way as

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United States v. Wright, 43 F.3d 491, 495 (10th Cir. 1994) (citation omitted).

would an affirmative representation that exculpatory evidence does not exist when, in fact, it does"). *Miller*'s analysis is thus entirely consistent with Justice Blackmun's observation that defendants rely on such nondisclosure in making "pretrial and trial decisions." *Id.*[14]

4. The Lower Courts Agree That *Brady* Applies Pre-Plea.

While this case presents the Court's first opportunity to apply *Brady* in a prosecution involving a guilty plea, lower courts have applied *Brady* to the guilty plea process for years. *See United States v. Walters*, 269 F.3d 1207, 1214 (10th Cir. 2001) ("under certain limited circumstances, 'the prosecution's violation of *Brady* can render a defendant's plea involuntary' ") (quoting *Wright*, 43 F.3d at 496); *United States v. Ross*, 245 F.3d 577, 583 n.1 (6th Cir. 2001) (recognizing that a defendant may file a post-plea *Brady* claim) (citing *Campbell v. Marshall*, 769 F.2d 314 (6th Cir. 1985)); *White v. United States*, 858 F.2d 416, 423-24 (8th

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[14] *Amici* States argue that the majority rule requiring pretrial *Brady* disclosure is out of step with various American Bar Association ("ABA") standards. B.A.S. at 6 n.1, 11. On the contrary, "the ABA Standards for Criminal Justice . . . call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate." *Kyles*, 514 U.S. at 437 (citing ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3-3.11(a) (3d ed. 1993) and ABA Model Rule of Professional Conduct 3.8(d) (1984)); *see also In the Matter of Grant*, 541 S.E.2d 540 (S.C. 2001) (public reprimand issued to prosecutor who did not disclose *Brady* material prior to a guilty plea). The Standards for Criminal Justice require that disclosure be " 'timely' " and made " 'at the earliest feasible opportunity.' " *Id.*

Cir. 1988) (finding that the exculpatory evidence at issue "was significant and . . . it should have been disclosed" but habeas relief denied due to lack of materiality); *Banks v. United States*, 920 F. Supp. 688, 691-92 (E.D.Va. 1996) (following the cases cited herein); *Gardner*, 885 P.2d 1144 (allowing withdrawal of guilty plea due to *Brady* violation); *Scroggins v. State*, 859 S.W.2d 704 (Mo. App. 1993) ("[t]he principles of *Brady* are applicable to the entry of a plea of guilty") (citation omitted); *State v. Parsons*, 775 A.2d 576, 580-81 (N.J. Super. 2001) (agreeing with *Sanchez*); *Gibson*, 514 S.E.2d at 324-25 (same); *State v. Davis*, 823 S.W.2d 217, 219-20 (Tenn. Ct. Crim. App. 1991) (same as *Gardner*); *Villareal v. State*, 860 S.W.2d 529, 532-33 (Ct. App. Tex. 1993) ("withholding . . . [material] evidence [from a defendant pleading guilty] amount[s] to a denial of [the defendant's] federal and state constitutional rights to due process and due course of law") (citing *Lewis*, 587 S.W.2d at 699-701); *State v. Sturgeon*, 605 N.W.2d 589 (Wis. 1999) (guilty plea withdrawn due to *Brady* violation).

5. The *Brady* Trilogy Supports Recognition of a Due Process Right to Pre-Plea *Brady* Disclosure.

The Solicitor General argues that pre-plea *Brady* disclosure cannot be reconciled with the Court's cases recognizing the constitutionality of plea bargaining and vindicating the interest in the finality of convictions entered pursuant to guilty pleas. *Ruiz* and *Miller* address the Court's decision in *Brady v. United States*, and explain why a plea entered without *Brady* disclosure is invalid. In the event that the Court rejects their analyses, Respondent will address the Solicitor General's arguments.

The Solicitor General argues that there is no net gain in accuracy from pre-plea *Brady* disclosure because "there is no serious risk that an innocent person will be convicted because the prosecution did not disclose exculpatory evidence." B.U.S. at 13. Similarly, he argues that once a defendant "solemnly swears in open court that he has committed the offense, there is no reason to question the accuracy of the resulting entry of a finding of guilt." *Id.* He overlooks the Court's recognition that no guilty plea framework is "foolproof," *Brady v. United States*, 397 U.S. at 758, that defendants do not always make admissions at their guilty pleas, and that cases arise in which it is difficult for a defendant to determine whether he is guilty.

a. Negotiated Guilty Pleas Are Not "Foolproof."

The Court has recognized that "no procedural device for the taking of guilty pleas is so perfect in design and exercise as to warrant a per se rule rendering it 'uniformly invulnerable to challenge.' " *Blackledge v. Allison*, 431 U.S. 63, 73 (1977) (quoting *Fontaine v. United States*, 411 U.S. 213, 215 (1973)). Thus, even though Allison explicitly denied that any promises had been made to induce his plea at the time he entered it, the Court permitted him to assert a later claim that there were such promises and that they went unfulfilled: "the barrier of the plea or sentencing proceeding record, although imposing, is not invariably insurmountable." *Id.* at 74 (footnote omitted). In short, "if, as Allison alleged, he was advised by his counsel to conceal any plea bargain, his denial that any promises had been made might have

been a courtroom ritual more sham than real." *Id.* at 78 (footnote omitted). If a defendant may seek to conceal the promises he received to secure the benefit of his bargain, it follows that he might also falsely declare his guilt, particularly if he receives advice that a favorable plea offer can only be accepted by making such statements.

The Court has also acknowledged that it cannot "say that guilty plea convictions hold no hazards for the innocent." *Brady v. United States*, 397 U.S. at 757.

> This mode of conviction is no more foolproof than full trials to the court or to the jury. Accordingly, we take great precautions against unsound results, and we should continue to do so whether the conviction is by plea or trial. We would have serious doubts about this case if the encouragement of guilty pleas by offer of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves. But our view is to the contrary and is based on our expectations that courts will satisfy themselves that pleas of guilty are voluntarily made by competent defendants with adequate advice of counsel and that there is nothing to question the accuracy and reliability of the defendants' admissions that they committed the crimes with which they are charged.

Id. The Court's confidence in guilty pleas is based on two assumptions: that defendants receive "adequate advice of counsel," and "that there is nothing to question the accuracy and reliability of the defendants' admissions." *Id.* As to the first assumption, the Court has already held that a plea not meeting that criterion is invalid. *See Hill*, 474 U.S.

52.[15] As to the second, the Solicitor General proposes to undermine the Court's expectation "that there is nothing to question the accuracy and reliability of the defendants' admissions." *Brady v. United States*, 397 U.S. at 757. Indeed, *every* viable post-plea *Brady* claim calls the accuracy of those admissions into question: the disclosure of previously unknown and material exculpatory evidence by definition casts doubt on "the justice of the finding of guilt." *Agurs*, 427 U.S. at 112. Because "guilty plea convictions [hold some] hazards for the innocent," *Brady v. United States*, 397 U.S. at 757, those hazards will be greatly increased if the prosecution gains the ability to withhold material exculpatory evidence.

The Court's decisions affirming the viability of judgments entered pursuant to guilty pleas have not addressed the situation in which the plea is undercut by a claim that goes directly to its viability. The Solicitor General cites *Menna v. New York*, 431 U.S. 61 (1975) (per curiam), for the proposition that " 'a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case.' " B.U.S. at 13 (quoting *Menna*, 431 U.S. at 62 n.2). *Menna* followed that observation with its analysis of the question of which constitutional claims were foreclosed by a guilty plea.

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[15] *Hill*'s holding that a claim of ineffective assistance of counsel in the plea process may be asserted after a guilty plea suggests that "those constitutional rights that assure the integrity of the guilty plea process itself" may be asserted after such a plea. McMunigal, *Disclosure and Accuracy*, 40 Hastings L.J. at 1022.

> In most cases, factual guilt is a sufficient basis for the State's imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction if factual guilt is validly established.

Menna, 431 U.S. at 62 n.2. The failure to disclose material exculpatory evidence to a defendant contemplating a guilty plea is not "render[ed] irrelevant" by a guilty plea because it is a "constitutional violation[ ] . . . logically inconsistent with the valid establishment of factual guilt." *Id.*

Menna is correct. In *Brady v. United States*, "nothing in the record impeache[d] Brady's plea or suggest[ed] that his admissions in open court were anything but the truth." 397 U.S. at 758. His sole claim was that his plea was motivated by his misapprehension of the availability of the death penalty, a claim "not logically inconsistent with the valid establishment of factual guilt." *Menna*, 431 U.S. at 62 n.2.

Similarly, in *Tollett*, the Court observed that "independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea" are foreclosed by the plea. *Tollett*, 411 U.S. at 267. Thus, the "plea in abatement" that Tollett wished to raise on collateral review – a challenge to the racial makeup of the grand jury – was barred by his guilty plea. The improper constitution of Tollett's grand jury, however, said nothing about whether Tollett was guilty; that claim was "not logically inconsistent with the valid establishment of factual guilt." *Menna*, 431 U.S. at 62 n.2.

The defendants in *McMann* also raised an "independent" claim. They argued that if the jurisdiction in which they were convicted had provided a constitutionally adequate method to determine the admissibility of an out of court confession, they would not have entered guilty pleas. *McMann*, 307 U.S. at 768. Their claim was not, however, that the prosecution had somehow suppressed evidence regarding the out of court confession. Instead, "at most[, they asserted] a claim that the admissibility of [their] confession[s] was mistakenly assessed." *Id.* at 769.

Unlike the suppression of material exculpatory evidence, a legal error as to the admissibility of a confession does not directly undercut the accuracy of the admissions in the guilty plea. *Id.* at 773. *Kyles* illustrates the point:

> One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence[, i.e., the confession,] should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

514 U.S. at 435. To use *Tollett*'s terminology, the confession's admissibility is an "independent" constitutional issue that does not undermine confidence in the plea.[16]

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[16] The Court's decision in *United States v. Broce*, 488 U.S. 563 (1989), also involved an "independent" constitutional claim. There, the defendants claimed that even though they entered pleas of guilty to two conspiracies, prosecution on the second was barred by the Double Jeopardy Clause. The *Broce* defendants, however, "pleaded guilty to indictments that on their face described two separate conspiracies." *Id.* at 576. In raising their post-plea Double Jeopardy claim, the *Broce* defendants did not challenge the reliability of their admissions, but rather wished to pursue a legal theory that the two indictments actually referenced a single conspiracy. As the Court pointed out, "[t]hey chose not to, and hence relinquished that entitlement." *Id.* at 571. The fact that their decision may have been a "strategic miscalculation" regarding the applicable law did "not justify setting aside an otherwise valid guilty plea." *Id.* Because there "was nothing to question the accuracy and reliability of the defendants' admissions," *Brady v. United States*, 397 U.S. at 758, the independent Double Jeopardy claim was foreclosed.

b. The Lack of *Brady* Disclosure Compromises the Accuracy of *Alford* and *Nolo Contendere* Pleas.

The Solicitor General's assertion that when a defendant "solemnly swears in open court that he has committed the offense, there is no reason to question the accuracy of the resulting entry of a finding of guilt," B.U.S. at 13, focuses solely on those cases where the defendant makes such admissions. Those concerns are absent in cases where a *nolo contendere* plea is entered, *see, e.g.*, Fed. R. Crim. P. 11(b), or when the defendant pleads guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), without providing a factual basis. Although the Solicitor General claims that it is "unusual"[17] for defendants to enter such pleas, B.U.S. at 16 n.2, nearly every

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[17] Such pleas are more common than the Solicitor General thinks. *Cf. In re Alvernaz*, 8 Cal. Rptr.2d 713, 717-18 (Cal. 1992) ("[t]he declarations of several criminal defense attorneys practicing in San Diego County represented that they could not recall any occasion in which either the district attorney or the trial court had rejected a plea bargain simply because it was [a plea of *nolo contendere*]").

jurisdiction in the United States provides a mechanism for pleas of *nolo contendere* or *Alford* pleas.[18]

In any event, even where there is a factual basis provided, *Hill*, 474 U.S. 52, still provides a basis to challenge a guilty plea: it contains no exception for cases in which the defendant provides a "factual basis." *See also* Fed. R. Crim. P. 32(e) (permitting guilty plea to be withdrawn prior to sentencing for "any fair and just reason" and also containing no "factual basis" exception).

c. Some Defendants Cannot Determine Their Guilt or Innocence Absent *Brady* Disclosure.

Brady disclosure will also serve to prevent miscarriages of justice in cases involving offenses containing elements that are either outside the defendant's knowledge or are based upon application of objective standards. As for the former category of offenses, numerous crimes contain elements that are outside the defendant's personal knowledge. For example, a number of offenses require that the victim be under a certain age. A defendant may well not have personal knowledge of the victim's age and lack access to evidence that calls that element into question, evidence that the government may possess due to its superior access to the victim or to confidential records. Similarly, in a bank robbery case, *see* 18 U.S.C. § 2113(a), a defendant would typically lack any

[18] *See*, Note, *The Alford Plea: A Necessary But Unpredictable Tool for the Criminal Defendant*, 72 Iowa L. Rev. 1063, 1067 n.49 (1987) (collecting cases).

personal knowledge of the FDIC insurance element that the government may possess.[19] Even the availability of certain defenses may turn on facts outside the defendant's knowledge, as is the case in entrapment, in which the defendant may not know that the person who solicited him was a government agent. *See Crooker*, 729 F.2d at 890.[20] In these hypotheticals, the defendant lacks conclusive knowledge of his guilt or innocence, thus making pre-plea disclosure of exculpatory evidence even more significant. *See generally* McMunigal, *Disclosure and Accuracy*, 40 Hastings L.J. at 972-75.

[19] The Solicitor General acknowledges that a defendant will occasionally be unable to determine guilt or innocence, but he insists this situation is rare and does not justify imposition of a constitutional disclosure requirement. B.U.S. at 14 n.1. He again ignores the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *Winship*, 397 U.S. at 372 (Harlan, J., concurring).

[20] The Solicitor General suggests that Respondent could determine her own guilt and did so when she entered her plea of guilty. B.U.S. at 14 n.1. As he has acknowledged, however, the issue in this case is whether or not it was constitutional for the prosecutor to insist that she waive her right to *Brady* material as a condition of a plea bargain. *Id.* at 9. At any rate, it is extremely unlikely that Respondent had actual knowledge of whether or not the substance secreted in the vehicle actually was marijuana. If she were to waive her right to *Brady* disclosure, she would then bear the risk that the substance proved to be benign. *Cf.* Holly Becka & Tim Wyatt, *Fake Drugs Cast Doubt on 24 Cases: Police Study Procedures After Evidence Is Found To Be Crushed Wallboard*, Dallas Morning News, January 15, 2002, at 1A, available at 2002 WL 2007783 (nearly half of all "cocaine" seized by Dallas police in 2001 was finely crushed wallboard, requiring reconsideration of numerous convictions, including several in which guilty pleas were entered).

As to the latter category, numerous defenses and offense elements turn on the analysis of objective factors, such as the reasonableness of one's conduct or the justifiability of a particular course of conduct. *See generally id.* at 976-80 ("It is problematic to expect the typical defendant pleading guilty to provide accurate answers to questions such as the reasonableness of the defendant's conduct or belief, or the justifiability of taking a particular risk, in the same way that we rely on a defendant pleading guilty to reveal the truth about his own conduct or subjective mental state"). Again as an example, a claim of self defense frequently requires a showing of the reasonableness of the defendant's fear, an objective fact that could be corroborated by facts of which the defendant was unaware. *See, e.g., United States v. James*, 169 F.3d 1210, 1214-15 (9th Cir. 1999) (defendant's self defense theory was corroborated by documentary proof of victim's prior violent acts even though the defendant had never reviewed the documents). Because "[s]elf-defense is about as basic a moral and legal principle there is," *id.* at 1215 (citations omitted), no legitimate policy could be served by allowing James to enter a guilty plea without disclosure of the documents which corroborated the victim's violent past had she been unaware of them and had the government possessed them. Objective determinations are frequently required in offense elements as well.[21]

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[21] In *Henderson v. Morgan*, 426 U.S. 637 (1976), the Court considered a case involving a homicide statute which permitted a finding of increased liability based upon what was apparently a purely objective standard. *Henderson* involved a homicide in which a second degree murder charge was filed, but the defense

Procedural protections like those contained in Fed. R. Crim. P. 11 cannot compensate for the lack of *Brady* disclosure in such cases. While Rule 11(f) does require the district court to satisfy itself that there is a factual basis for a guilty plea – but not for a plea of *nolo contendere* – that inquiry is sharply limited. For example, a failure to inquire into the applicability of an affirmative defense "does not even violate the technical requirements of Rule 11. Nothing in Rule 11 requires the trial judge to inform the defendant of every possible defense he may have." *Dismuke v. United States*, 864 F.2d 106, 107 (11th Cir. 1989) (per curiam); *accord United States v. Smith*, 160 F.3d 117, 123 (2d Cir. 1998). Therefore, if the prosecution withholds information establishing an affirmative defense, Rule 11 does nothing to protect a defendant ignorant of the material facts.

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contended that a manslaughter charge was more appropriate under the facts, including the defendant's limited mental abilities. The second degree murder charge, however, included as an element the requirement that the "assault was committed with a design to effect the death of the person killed." *Id.* at 645 (internal quotations, footnotes omitted). The Court observed that the crucial "element of the [second degree murder] offense might have been proved by the objective evidence *even if respondent's actual state of mind was consistent with innocence or manslaughter.*" *Id.* (emphasis added). Thus, the existence of objective evidence – of which the defendant may not have been aware – may have been dispositive. The failure to disclose exculpatory evidence relevant to this objective standard could lead to a plea of guilty by a defendant whose "actual state of mind was consistent with innocence or manslaughter." *Id.*

6. The Policy Arguments Offered by the Solicitor General and the *Amici* States Are Far Outweighed By the Individual and Societal Interests In Not Convicting the Innocent.

Citing *Ake*, 470 U.S. at 77, the Solicitor General, B.U.S. at 24-33, advances a number of policy justifications for his view that innocent defendants contemplating the choice between trial and plea bargaining should not have the benefit of material exculpatory evidence possessed by the government. Because such disclosure is essential to a valid guilty plea, *Sanchez*, 50 F.3d at 1453, these arguments are foreclosed. Even if they are not, they are unconvincing.

Ake identifies three relevant factors:

> The first is the private interest that will be affected by the action of the State. The second is the governmental interest that will be affected if the safeguard is to be provided. The third is the probable value of the additional or substitute safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided.

470 U.S. at 77 (citations omitted). Although the Solicitor General does not mention it, as to the first factor, "[t]he private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling," and that interest "weighs heavily in [the Court's] analysis." *Id.* at 78.

As to the second factor, his analysis is doubly flawed: it ignores the sovereign's interest in accurate determinations of criminal liability and fails to account for the requirement of materiality in his strident claims that

adopting the majority view that *Brady* applies to plea bargaining will radically change the prosecution of criminal offenses. The sovereign has a "compelling interest . . . in accurate dispositions of criminal accusations." *Id.* at 79. As a result, "a State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained." *Id.* That is precisely what the Solicitor General seeks to do here: he wishes to maintain "a strategic advantage over the defense," at the cost of encouraging innocents to accept plea bargains.

Moreover, while the Solicitor General and the *Amici* States identify a number of perceived negative consequences of pre-plea application of *Brady*, they fail to address *Brady*'s inherent limitation: it only applies to *material* exculpatory evidence. For example, the Solicitor General expresses concern that prosecutors may be required to make disclosures that would disrupt undercover investigations and endanger witnesses. B.U.S. at 25-28. But *Ruiz* does not require the wholesale disclosure of the identities of informers, although occasionally it may. It does so only when the information is material. *Sanchez* illustrates this point: Mr. Sanchez did not prevail because his assertion that he would have pursued entrapment and outrageous governmental misconduct claims if he had known the identities of the informants was rejected because it was not objectively reasonable. *See* 50 F.3d at 1454. The evidence he was denied was neither material nor subject to disclosure. *Id.* In those cases where the information is material, such as those where a defendant who is not predisposed to commit drug offenses is

induced to do so by a government informant, the balance, as tilted by the antecedent determination of materiality, properly favors disclosure.[22]

The argument that *Ruiz* advances the availability of discovery and creates a burden on prosecutors by requiring them to collect and assess evidence at an earlier stage in order to determine if it constitutes *Brady* material is equally unavailing. B.U.S. at 28-30. As an initial matter, application of *Brady* prior to a guilty plea does not modify the basic timing requirement of *Brady* disclosure: it must be disclosed in time for effective use at the proceeding. *See Coppa*, 267 F.3d at 142 ("*Brady* material must be disclosed in time for its effective use . . . at a plea proceeding").

As to the pre-plea assessment of the evidence, the Solicitor General seems to complain only about gathering impeachment evidence. B.U.S. at 29-30; *see also* B.A.S. at 12-15. Again, only material impeachment evidence must be disclosed. The Solicitor General complains that the prosecutor will be required to engage in " 'the often time-consuming process of determining which witnesses [they] may call at trial, what potential impeachment information on each witness is in [their] possession, and whether [they] must disclose that information to the

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[22] *Amici* States claim that *Ruiz* requires extensive disclosures regarding crime victims. B.A.S. at 12-13. The States make no effort to demonstrate that such disclosures are likely to be material. *Id.* Moreover, they ignore the availability of other measures, such as protective orders, to address such concerns. *See, e.g.*, Fed. R. Crim. P. 16(d)(1); *see also Ritchie*, 480 U.S. 39 (approving in camera submission to trial court of sensitive information).

defendant.' " B.U.S. at 30 (quoting *Ruiz*, 241 F.3d at 1176-77 (Tallman, J., dissenting)). Because only the most significant impeachment material would be termed "material," *see Sanchez*, 50 F.3d at 1454, it is hard to imagine that anything other than significant impeachment of a significant prosecution witness would ever qualify. It is hardly burdensome to ask a prosecutor to know who her most important witnesses are and whether they are subject to dramatic impeachment.[23]

The government's concern for the finality of judgments, *B.U.S.* at 30-31, is addressed in *Hill*, which concluded that "requiring a showing of 'prejudice' from defendants who seek to challenge the validity of guilty pleas on the ground of ineffective assistance of counsel will serve the fundamental interest in the finality of guilty pleas." 474 U.S. at 58 (citation omitted); *see also Strickland*, 466 U.S. at 694 ("[a]n ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker"). Because any successful *Brady* claim includes, by definition, a showing of materiality, *Strickler*, 527 U.S. at 281-82, the pre-plea disclosure rule adopted by the lower courts provides precisely the same assurance that the finality of judgments will not be unnecessarily disturbed.[24]

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[23] A prosecutor may delegate the duty to search for impeachment material. *See United States v. Jennings*, 960 F.3d 1488, 1491-92 and n.3 (9th Cir. 1992).

[24] The lack of *Brady* disclosure calls into question whether a plea secured by withholding material exculpatory evidence gives rise to a legitimate expectation of finality on the part of the State. In *Lefkowitz v. Newsome*, 420 U.S. 283 (1975), the Court

Also, the government's complaint about having to do more work at the initial stages of a case conflicts with its contentions regarding finality. Assuming *Brady* disclosure, some *Hill* claims will be foreclosed because a criminal defendant cannot claim that his lawyer failed to discover evidence that the prosecutor disclosed. By the same token, whenever the prosecution fails to disclose material evidence, it lays the groundwork for a potential *Hill* claim: the defendant can always argue that the lawyer should have discovered on her own what the prosecution withheld. The prosecution can eliminate future *Hill* claims, and enhance accuracy, by disclosing *Brady* material.

The government's concern about the plea bargaining process also "focuse[s] entirely on [its] incentives and completely ignores the other essential party to the transaction: the [defendant]." *Mezzanatto*, 513 U.S. at 207. While a prosecutor may wish to do even less work in a plea bargain case, a defendant is often less likely to accept a plea agreement where he must give up his right to receive exculpatory information, as exemplified by what happened in this very case. *See also* Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's*

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permitted a defendant who had entered a guilty plea to challenge the determination that his confession was admissible on collateral review because the law of the state in which he entered his plea permitted an appeal of that issue. As a result of that state law, there was no "legitimate expectation of finality." *Id.* at 289-90. Because the failure to disclose *Brady* material is essentially a misrepresentation, *Miller*, 848 F.2d at 1320, a State cannot harbor a "legitimate expectation of finality" in such a plea because it has unclean hands.

Guide To Loss, Abandonment and Alienation, 68 Fordham L. Rev. 2011, 2043-44 and n.189 (2000) (impasse in plea negotiations created by *Brady* waiver issue).

Moreover, the Solicitor General will not dispute that the "fast-track" plea bargain program in the Southern District of California has survived in the wake of *Ruiz*. That program has proceeded in the same fashion, simply without the inclusion of *Brady* waiver provisions in the plea agreement.[25]

To the extent that *Brady* waivers relieve prosecutors of their duty to collect and evaluate potential *Brady* evidence, due process concerns are demeaned. *See Strickler*, 527 U.S. at 280 ("the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police"). As to any claim of difficulty in assessing such information pre-plea, *Kyles* counsels prosecutors to err on the side of disclosure. 514 U.S. at 439 ("Unless, indeed, the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on the trial's outcome as to destroy confidence in its result"). There is no reason to believe that the pre-plea *Brady* test is any more difficult to apply than the post-trial

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[25] The Solicitor General has provided no evidence that the absence of *Brady* waivers will have a devastating impact on criminal investigations and prosecutions. *See Mezzanatto*, 513 U.S. at 209 n.6 ("Respondent has failed to offer any empirical support for his apocalyptic predictions").

test; the government "cannot avoid [its] responsibility" to ensure that guilty pleas are entered knowingly and voluntarily. *Id.*

In short, the policy arguments raised by the Solicitor General do not outweigh the "compelling interest of both the States *and* the individual in accurate dispositions." *Ake*, 470 U.S. at 79 (emphasis added). Because the procedural safeguards sought will substantially reduce the possibility of inaccurate guilty pleas and convictions, *id.* at 77, the balancing test contained in the third *Ake* factor strongly favors recognition of a pre-plea *Brady* right.

B. The Right To Pre-Plea *Brady* Disclosure Cannot Be Waived Because It Is Necessary to a Knowing and Voluntary Plea and Because Such Disclosure Is Fundamental to the Reliability of the Fact-Finding Process.

The Solicitor General also contends that, even if a defendant has a right to receive *Brady* information before pleading guilty, that right can be waived in a plea agreement. B.U.S. at 33-34. As an initial matter, the Solicitor General does not challenge the Ninth Circuit's conclusion that *Brady* rights cannot be waived in a plea agreement because they are essential to a valid guilty plea. *See Ruiz*, 241 F.3d at 1164-65 (analogizing to the widespread rule among the courts of appeals that ineffective assistance of counsel claims cannot be waived in a plea agreement because they undermine the validity of the plea itself). Consistent with this conclusion, the Court has stated that if a guilty "plea was so coerced as to deprive it of validity to support the conviction, the coercion likewise deprived

it of validity as a waiver of his right to assail the conviction." *Waley v. Johnston*, 316 U.S. 101, 104 (1942).

In other words, if the Court determines that the failure to disclose *Brady* information invalidates a guilty plea, then it must also conclude that the right to receive *Brady* information cannot be waived in a plea agreement. Given the Solicitor General's failure to dispute this reasoning, the only way that his waiver argument becomes relevant is if the Court determines that a defendant has the right to receive *Brady* information in the guilty plea context, but that the disclosure of such information is not required to ensure a valid guilty plea. Even if the Court takes this route, however, it should still determine that waiver cannot apply.

While the Solicitor General correctly states that the Court has recognized that many fundamental rights are waivable, *see Mezzanatto*, 513 U.S. at 201, he incorrectly contends that the right to receive *Brady* information is indistinguishable from such waivable rights. B.U.S. at 33. Instead, the right to receive *Brady* information is one of those rights that "are so fundamental to the reliability of the factfinding process that they may never be waived without irreparably 'discrediting the federal courts.' " *Mezzanatto*, 513 U.S. at 204 (citation omitted). The credibility of the criminal justice system would be diminished if courts were to accept guilty pleas while prosecutors silently stood by knowing that there was information pointing to innocence.

Moreover, our guilty plea " 'system should be given a stable and constant structure, one that cannot be varied by a court with or without the consent of the parties. . . . ' "

Id. at 205 (quoting *United States v. Olano*, 507 U.S. 725, 742 (1993) (Kennedy, J., concurring)). *Brady* rights are rooted in the structural integrity of the justice system and therefore should not be compromised because two parties, perhaps out of a desire to resolve a case so that they can "concentrate on matters they deem more pressing[,]" believe that it is a good idea to bargain them away. *Olano*, 507 U.S. at 742 (Kennedy, J., concurring).

When considering the availability of waiver, it is important to emphasize that *Brady* does not simply bestow personal rights upon a defendant but also imposes obligations upon prosecutors that are designed to protect the integrity and truth-seeking purpose of the criminal justice system as a whole. *See Kyles*, 514 U.S. at 439. In other words, *Brady* rights are also rooted in the public interest, and therefore a defendant and a prosecutor cannot simply waive their applicability in a plea agreement. *See Plea Bargain Waivers*, 68 Fordham L. Rev. at 2080.[26] *See also Peretz v. United States*, 501 U.S. 923, 937 (1991 ("a litigant may not waive structural protections"); *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 704 (1945) (private rights "charged or colored with the public interest" cannot be waived where waiver will defeat public interest).

The truth-seeking function of *Brady* rights is designed to instill public confidence in the outcome of criminal proceedings. As Justice Kennedy explained when writing for the Ninth Circuit, waiver is not available for rights

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[26] The cited article also takes a multi-disciplinary approach in concluding that *Brady* rights cannot be waived. *See* Blank, *Plea Bargain Waivers*, 68 Fordham L. Rev. at 2060-85.

that are designed to instill such confidence. *See United States v. Lopez*, 581 F.2d 1338, 1341 (9th Cir. 1978) (The right to a unanimous verdict under Fed. R. Crim. P. 31 cannot be waived because it "has a precise effect on the fact-finding process, one which gives particular significance and conclusiveness to the jury's verdict. Both the defendant and society can place special confidence in a unanimous verdict. . . . ").[27]

It is for these reasons that the right to receive *Brady* material is distinguishable from the various waivable constitutional rights listed by the Solicitor General. B.U.S. at 33. For example, the purely personal protections bestowed by the Double Jeopardy Clause have nothing to do with the truth-seeking process. Thus, the availability of waiver is not surprising. Likewise, it is not surprising that waiver is available for the privilege against compulsory self-incrimination because, unlike the *Brady* right to *disclosure* of information, it is a personal right that involves the *suppression* of evidence and therefore does

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[27] Although *Brady* is designed to instill public confidence in the accuracy of our criminal justice system, the likely outcome of the Solicitor General's waiver position is that *Brady* will hardly ever apply. "[D]efendants are generally in no position to challenge demands for [such] waivers, and the use of waiver provisions as contracts of adhesion has become accepted practice." *Mezzanatto*, 513 U.S. at 216 (Souter, J., dissenting). Indeed, the waiver provision disputed in this case was a standard provision in a standard plea agreement in the Southern District of California. Given that the overwhelming majority of defendants plead guilty, the standardization of these waiver provisions will mean that *Brady* will hardly ever apply. Thus, accepting the Solicitor General's argument will likely serve to transform a fundamental right into a vestigial one.

not enhance the truth-seeking process. *See Mezzanatto*, 513 U.S. at 204 (allowing waiver of the right because it involved the suppression of evidence and therefore did not "*enhance*[ ] the truth-seeking function" of the federal criminal justice system) (emphasis in original).

Furthermore, while the rights to jury trial and to confront witnesses certainly enhance the search for truth,[28] they are only waivable through the guilty plea process, *see Boykin v. Alabama*, 395 U.S. 238, 243 (1969), a process designed to protect the public's interest in accurate outcomes. In other words, these rights are not waivable in all respects but instead are only waivable to the extent that the waiver does not diminish society's interest in the reliable disposition of criminal cases. For example, with respect to the right to a jury trial, it is highly doubtful that a defendant could contest guilt at a trial where he waived the right to a jury and instead " 'stipulated to trial by 12 orangutans. . . . ' " *Mezzanatto*, 513 U.S. at 204 (quoting *United States v. Josefik*, 753 F.2d 585, 588 (7th Cir. 1985)). Likewise, with respect to the right to confront witnesses, it is doubtful that a defendant could agree to contest his guilt at a trial where he would be prohibited from conducting cross-examination.[29]

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[28] The right to counsel also enhances the truth-seeking process, but waiver of that right must be available so that the right to represent oneself can be honored. *See Faretta v. California*, 422 U.S. 806 (1975).

[29] In pointing out that the right to confront witnesses may be waived, the Solicitor General contends that, at the very least, waiver should be available for the right to receive impeachment information, which is used for cross-examination. B.U.S. at 34. The Court, however, has specifically rejected any distinction between impeachment evidence and other exculpatory evidence. *See Bagley*, 473 U.S. at 676.

Finally, even if the Court were to determine that the right to receive exculpatory information is indistinguishable from the waivable rights listed by the Solicitor General, it should nonetheless prohibit *Brady* waivers because they "severely undermine a defendant's incentive to negotiate, and thereby inhibit plea bargaining." *Mezzanatto*, 513 U.S. at 211 (Ginsburg, J., concurring, joined by O'Connor and Breyer, JJ.). As argued earlier, the facts of this case and the district-wide controversies created in other federal courts, *see* Blank, *Plea Bargain Waivers*, 68 Fordham L. Rev. at 2043-44 and n.189, demonstrate that *Brady* waivers seriously disrupt the plea bargaining process. Accordingly, such waivers should be prohibited.

CONCLUSION

The judgment of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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